ROLAND CHONG YEW SOON A

v.

MAJLIS PERBANDARAN SUBANG JAYA & ANOR

HIGH COURT MALAYA, SHAH ALAM B
SURIYADI HALIM OMAR J
[CIVIL SUIT NO: MT1 21-30-2006]
29 JUNE 2006

CIVIL PROCEDURE: *Disposal of action without trial - Judicial review - Application for certiorari against public authority - Whether requiring leave of court - Whether notice of application for leave to be served on Attorney General - Non-compliance - Refusal to file afresh - Whether fatal - Whether action to be struck out - Rules of the High Court 1980, O. 53* C

The applicant, in applying for an order of *certiorari* against the first defendant public authority pursuant to O. 53 Rules of the High Court 1980 ('RHC'), had not first applied for leave as required by that order. At the hearing, upon being alerted as to the absence of leave and other requisites of O. 53, the learned judge advised the applicant to withdraw his application with liberty to file afresh – so as to enable the applicant to comply with the statute. Notwithstanding the well-intended advice, and the error in the cause papers, the applicant's counsel, however, refused to withdraw the application. The issue was whether the learned judge was, in the circumstances, entitled to strike out the application. D E

Held (striking out application *in limine*): F

(1) Leave as envisaged in O. 53 RHC is a statutory requirement and cannot be dispensed with. (para 7)

(2) The applicant has failed to comply with the pre-requisites of O. 53. Firstly, the applicant has not applied for leave, and secondly the applicant has not given notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers. Since the applicant has not applied for leave, this court need not look into the merits of the application at all and could strike out the application *in limine.* (paras 3 & 6) G H

(3) This court, in the interest of justice, had suggested to the applicant's counsel that he withdraw the application with liberty to file afresh in order that the applicant could fulfill all the prerequisites of O. 53. Unfortunately, the applicant's learned counsel seemed to I

A have thought otherwise and even deemed it fit to raise his voice at the Bench. In the circumstances, the court is left with no choice but to strike out his application. (paras 9 & 10)

[Order accordingly.]

B **Cases(s) referred to:**
IRC v. National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 ***(refd)***
Robert Cheah Foong Chiew v. Lembaga Jurutera Malaysia [2005] 1 LNS 24 ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA ***(refd)***
C *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA* ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 53 r. 3(1), (3)

For the applicant - TJ Chin (Michael Chow with him); M/s TJ Chin & Co
D *For the 1st respondent - Raja Eileen Soraya; M/s Raja, Darryl & Loh*
For the 2nd respondent - Hjh Badariah Hassan; State Legal Adviser, Selangor

Reported by Rose Aziz

E **JUDGMENT**

Suriyadi Halim Omar J:

[1] This application for judicial review as the above preamble suggests, was made under O. 53 of the Rules of the High Court 1980, F for an order of *certiorari* to quash a decision of the Subang Jaya Municipal Council on 23 December 2005, approving the development of a proposed graveyard and crematorium in the Ayer Hitam Forest Reserve in Bandar Putra Permai, district of Petaling, Selangor Darul Ehsan.

[2] On 16 May 2006 counsel Mr. Michael Hong had appeared for G the applicant, TJ Chin and Sumila Shankey with him. Federal counsel Raja Eileen had appeared for the 1st and 2nd respondents. Raja Eileen had raised an objection that the application was not served on the Attorney General three days before the date of the bearing. On 19 June 2006 I suggested to Mr. Michael Hong that he withdraw the H application with liberty to file afresh in view of the fact that his cause papers had not mentioned that he was applying for leave to make this application for judicial review. Despite my good intentions, Mr. Michael Hong had deemed it fit to raise his voice and said that he was not withdrawing his application even though there was an error. It must be I stated that this incident was not recorded, but as it was still fresh I have no problems in recalling it. In those circumstances, as the papers were not in order I had no alternative but to strike out his application in encl. 1.

I believe that it is trite that leave is a prerequisite before anyone wishes to make an application for *certiorari* against any Public Authority. I refer to the provisions of O. 53 r. 3 of the Rules of the High Court:

> (1) No application under this Order shall be made unless leave therefore has been granted in accordance with this rule.
>
> (2) An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.
>
> (3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.
>
> (4) The Judge, may, in granting leave, impose such terms as to costs and as to the giving of security as he thinks fit.
>
> (5) The grant of leave under this rule shall not, unless the judge so directs, operate as a stay of the proceedings in question

[3] From the above provisions, it is evident that the applicant has failed to comply with two prerequisites:

> Firstly, the applicant has not applied for leave. Nowhere in his cause papers did he mention anything about leave.
>
> Secondly, the applicant has not given notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers. The Federal Counsel Raja Eileen had raised this when the parties appeared before me on 16 May 2006.

[4] This requirement for leave is also evident from a look at the various authorities on this point. One such authority is *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 CA where Zaleha Zahari JCA in her dissenting judgment said:

> Order 53 of the Rules envisages a two stage process. An applicant must first obtain (O. 53 r. 3(1)). which application must be made *ex parte* to a judge-in-chambers, supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, supported by affidavits verifying the facts relied on. The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers (O. 53 r. 3(3)). and must at the same time lodge in those chambers copies of the statement and affidavits.

> ... If leave is granted, the applicant must then file the substantive motion within 14 days after the grant of such leave and must serve the same on all persons directly affected by the application not later than 14 days before the date of hearing specified in the substantive motion.

[5] As for the Federal Counsel's appearance, I find Zaleha Zahari JCA (dissenting) views in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* very apt in this kind of situation. Zaleha Zahari said:

> Although the Rules provides for leave application for judicial review to be made *ex parte*, from the authorities cited there have been several instances where putative respondents have been given the opportunity of being heard, the objections of which is not necessarily confined to arguments on extension of the time frame prescribed by the Rules for the filing of an application for judicial review. For example, in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697 CA , the respondents to the application for leave was present at the hearing of the ex parte application and the appeal there from. Both respondents were heard and the objections were upheld by the judge at first instance. Neither the court of first instance, nor the Court of Appeal, found the presence of the respondents at the application for leave for judicial review, and at the subsequent appeal, objectionable.

[6] Since the applicant has not applied for leave, I need not look into the merits of the application at all and could strike out this application *in limine*. This is so since even if leave is applied for and I am hearing this application at the leave stage, there is no need to look at the merits of the application at all. Gopal Sri Ram in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* referred to Lord Diplock in *IRC v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 643:

> The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.

[7] Without an application for leave, I would not be able to decide whether there is an arguable case or otherwise. Leave as envisaged above is a statutory requirement and cannot be dispensed with. The rationale, and correctly so, could be seen in *Robert Cheah Foong Chiew v. Lembaga Jurutera Malaysia* [2005] 1 LNS 24 where it was argued that

it would as a general rule be contrary to public policy and as such an abuse of court process to allow the applicant to evade the provisions of O. 53 for protection of the authorities.

[8] The applicant in the above case filed an originating summons against Lembaga Jurutera Malaysia, for various declaratory orders. Raus J said that the applicant by filing this originating summons was trying to evade the leave requirement of O. 53 of RHC and had accordingly allowed the respondent's application to strike out the applicant's originating summons.

[9] To reiterate in the interest of justice I had suggested to the applicant's learned counsel that he withdraw his application with liberty to file afresh in order that the applicant could fulfill all the prerequisites of O. 53 that he had failed to comply with here. Unfortunately, the applicant's learned counsel seemed to have thought otherwise and as said, had even deemed it fit to raise his voice at the Bench. Even though my notes of proceedings are brief, the events are still fresh in my mind since I have prepared these grounds a few days after the date of decision.

[10] In view of all the above reasons, the applicant had left me with no choice but to strike out his application in encl. 1.